A

SUPERINTENDENT OF LANDS & SURVEYS, BINTULU & ANOR

v.

AGI BUNGKONG & ORS

B

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
AZHAR MA'AH JCA

C [CIVIL APPEALS NO: Q-01-104-2010 & Q-02-394-2010]
21 OCTOBER 2011

NATIVE LAW AND CUSTOM: *Land dispute - Native customary rights - Respondents' native customary rights over lands as set out in*
D *map annexed to statement of claim - Provisional lease granted to second and third appellants on respondents' lands - Declaration by High Court that respondents' had native title over lands as shown in map annexed to statement of claim - High Court's decision not based on map annexed to statement of claim but on four other different maps - Whether reliance of*
E *four other different maps as evidence was pleaded in statement of claim - Whether High Court judge erred in his decision - Whether there were justifiable grounds for a retrial - Sarawak Land Code, s. 2(a) - Courts of Judicature Act 1964, ss. 71 & 72*

F ***CIVIL PROCEDURE:*** *Pleadings - Facts not pleaded - Claim for - Respondents' native customary rights over lands as set out in map annexed to statement of claim - Provisional lease granted to second and third appellants on respondents' lands - Declaration by High Court that respondents' had native title over lands as shown in map annexed to*
G *statement of claim - High Court's decision not based on map annexed to statement of claim but on four other different maps - Whether reliance of four other different maps as evidence was pleaded in statement of claim - Whether High Court judge erred in his decision - Whether there were justifiable grounds for a retrial - Courts of Judicature Act 1964, ss. 71 & 72*

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The appeals before this court were filed against the decision of the High Court in respect of two suits which had been consolidated and heard together. The first and second appellants in the first appeal respectively were the Superintendent of Lands
I and Surveys Department of Bintulu Division ('SLS') and the State

Government of Sarawak ('SGS'). The latter was the employer of the former. On the other hand, the first, second and third appellants in the second appeal respectively were Ladang Sawit Bintulu Sdn Bhd ('LSB'), Lembaga Tabung Haji ('LTH') and Semai Mekar Sdn Bhd ('SMSB'). The first appellant was a joint venture company set up by the second and third appellants. The respondents in both these appeals were Iban by race and natives of Sarawak. In the High Court, these actions were brought by the respondents as well as on behalf of the residents of the longhouse communities against the appellants. The subject matter of those suits concerned a parcel of land ('the disputed land') which was issued to LTH and SMSB by the SLS under a provisional lease of state land pursuant to the Sarawak Land Code (Cap 81). It was not disputed that LTH and SMSB were the joint registered holders of the disputed land. However, the respondents averred that at all material times, they had acquired, *inter alia*, native customary rights over the lands and the boundary or extent of their lands were set out in a map annexed to the statement of claim, marked 'M' and edged in yellow. They claimed that the disputed land which was issued to LTH and SMSB covered a substantial part of their native customary lands. The common defense of the appellants was that the disputed land was not part of the respondents' native customary lands. The High Court allowed the respondents' claims in the following terms, *inter alia*, (i) a declaration that the respondents had native title and/or native customary rights over the lands as delineated in the area marked yellow in the map marked 'M' as attached to the statement of claim; and (ii) a declaration that the provisional lease was subject to the respondents' native customary rights. However, the learned trial judge did not arrive at this decision based on map marked 'M' but on four different maps tendered as exh. P7, P8, P10 and P11 which were prepared by PW5, who had the experience in the field of mapping. The issues pertinent to these appeals addressed by the appellants were: (i) no evidence, either from the respondents' witnesses or from the documentary evidence that the provisional lease issued to LTH and SMSB was native customary land as identified in map marked 'M' in the statement of claim; (ii) map marked 'M' was never tendered in evidence although referred to in the statement of claim; (iii) PW5 did not testify that exh. P7, P8, P10 and P11 were similar to map marked 'M' or that

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these maps covered a substantial part of the land in the provisional lease; (iv) none of the respondents' witnesses gave evidence on map marked 'M'; and (v) the High Court judgment was not based on the respondents' own pleadings. Hence, the main focus of these appeals were in relation to the reference made to map marked 'M' and its existence thereof as it was not found to be in the records of appeal.

Held (allowing appeals with costs; setting aside order of the High Court)

Per Abu Samah Nordin JCA (majority):

(1) It is a settled principle of law that in an appeal on findings of facts, the appellate court should not interfere with those findings unless it appears that they are clearly wrong. However, the appellate court is justified in coming to a different conclusion if the finding of facts and the declarations granted by the trial judge were found to be erroneous and unsupported by evidence. (*China Airlines Ltd v. Maltran Air Corp*; refd). (para 26)

(2) The respondents had to establish as a matter of fact that the area in the disputed land which they are claiming, was the same land or substantially part of the same land which was set out in map marked 'M'. The submission on the law with regard to native customary rights and native customary lands would only be relevant if the respondents had first established that the area in the disputed land was the same land or substantially part of the same land as set out in map marked 'M'. (para 28)

(3) Map marked 'M' was never tendered as evidence in support of the respondents' claim, although that was their pleaded case. None of the respondents' witnesses either by way of oral testimony or from their witnesses' statements made any reference to map marked 'M'. In fact, there was never any attempt by the respondents' counsel to establish the existence of map marked 'M' at the trial. Thus, there was no evidence before the trial judge either by documentary evidence or orally that the disputed land in the provisional lease was in fact the respondents' native customary land as set out in map marked 'M'. There was also no evidence before the trial judge that the land in the maps as in exh. P7, P8, P10 and P11 were the same land as set out in map marked 'M'. (paras 22 & 23)

(4) There was evidence that certain part of the disputed land in the provisional lease overlapped with that claimed by the respondents based on maps exh. P7, P8, P10 and P11. However, there was no evidence that the overlapping areas formed part of the land in map marked 'M' due to the absence of the said map. Hence, it was obvious that the findings of facts and declarations granted by the High Court on the basis of map marked 'M' were erroneous and unsupported by evidence. (para 25)

(5) It is trite law that parties are bound by their own pleadings. If the respondents intended to rely on the maps in exh. P7, P8, P10 and P11 to prove their case against the appellants, they must state those facts in their pleading, otherwise, they are not entitled to give evidence of them at the trial. It was clear from the trial judge's judgment that he had granted the declarations based on the evidence of PW5 and the maps in exh. P7, P8, P10 and P11, which were prepared by PW5 but were never pleaded in the statement of claim. Such judgment was contrary to pleading, untenable in law and liable to be set aside. (paras 29, 32 & 35)

(6) This court had the power to order a retrial under s. 71 read with s. 72 of the Courts of Judicature Act 1964 but the conditions stated therein were not present in the appeals herein. Further, this case had been decided on its merits after a full trial and after hearing witnesses from both sides. As such, there was no justifiable basis for a retrial. (paras 37 & 39)

Per Hishamudin Mohd Yunus JCA (partially dissenting):

(1) There was no clear and satisfactory answers received in relation to the question of whether map marked 'M' was ever attached to the statement of claim. From the unsatisfactory and differing answers, it would appear that the entire proceeding before the High Court was a messy affair. There could possibly have been a mistrial and a miscarriage of justice contributed by all parties to the proceedings, including the learned trial judge. (para 48)

(2) The trial judge's supplementary grounds of judgment did not confirm whether or not map marked 'M' was attached to the statement of claim nor did the trial judge explain as to why he made reference to map marked 'M' twice in his main grounds of judgment when the respondents did not refer nor tender the said map during the trial. (para 66)

(3) In spite of the trial judge's supplementary grounds of judgment, the question as to whether or not map marked 'M' was ever appended to the statement of claim remained unanswered. Undoubtedly, these appeals must be allowed. However, in all probability, there had been a mistrial and the appropriate course of action under the circumstances would be to order a retrial before another judge with no order as to costs. (para 67)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan-rayuan di hadapan mahkamah ini telah difailkan terhadap keputusan Mahkamah Tinggi berkenaan dua tindakan guaman yang telah digabung dan didengar bersama. Perayu pertama dan perayu kedua di dalam rayuan pertama masing-masing merupakan Penguasa Jabatan Tanah dan Ukur Bahagian Bintulu ('SLS') dan Kerajaan Negeri Sarawak ('SGS'). SGS adalah majikan SLS. Perayu-perayu pertama, kedua dan ketiga pula di dalam rayuan kedua masing-masing adalah Ladang Sawit Bintulu Sdn Bhd ('LSB'), Lembaga Tabung Haji ('LTH') dan Semai Mekar Sdn Bhd ('SMSB'). Perayu pertama merupakan syarikat perniagaan bersama yang didirikan oleh perayu-perayu kedua dan ketiga. Responden-responden di dalam kedua-dua rayuan ini adalah berketurunan Iban dan anak-anak negeri Sarawak. Di Mahkamah Tinggi, tindakan ini telah dibawa oleh pihak responden dan juga bagi pihak penduduk komuniti rumah panjang terhadap pihak perayu. Subjek perkara tindakan tersebut adalah berkenaan sebidang tanah ('tanah tersebut') yang dikeluarkan kepada LTH dan SMSB oleh SLS di bawah satu pajakan sementara tanah negeri di bawah Kanun Tanah Sarawak (Cap 81). Ianya tidak dipertikaikan bahawa LTH dan SMSB adalah pemegang berdaftar bersama tanah tersebut. Walau bagaimanapun, responden-responden berhujah bahawa pada semua masa material, mereka telah memperolehi, antara lain, hak adat anak-anak negeri atas tanah dan had sempadan tanah mereka telah ditunjukkan di dalam peta yang dilampirkan bersama-sama penyata tuntutan, ditanda dengan 'M' dan disempadani dengan warna kuning. Mereka

menuntut bahawa tanah tersebut yang dikeluarkan kepada LTH dan SMSB meliputi sebahagian besar tanah hak adat anak-anak negeri. Pembelaan perayu-perayu adalah bahawa tanah tersebut tidak merangkumi bahagian tanah hak adat anak-anak negeri responden-responden. Mahkamah Tinggi telah membenarkan tuntutan pihak responden menurut terma-terma berikut, antara lain, (i) deklarasi bahawa responden-responden mempunyai hakmilik anak-anak negeri dan/atau hak adat anak-anak negeri terhadap tanah-tanah tersebut seperti ditunjuk di kawasan bertanda kuning di peta bertanda 'M' yang dilampirkan bersama penyata tuntutan; dan (ii) deklarasi bahawa pajakan sementara itu adalah tertakluk kepada hak adat anak-anak negeri pihak responden. Walau bagaimanapun, yang arif hakim perbicaraan tidak mencapai keputusan ini berdasarkan peta bertanda 'M' tetapi atas empat peta berlainan yang dikemukakan sebagai eks. P7, P8, P10 dan P11 yang disediakan oleh PW5 yang mempunyai pengalaman dalam bidang pemetaan. Isu-isu penting bagi rayuan-rayuan ini yang dibangkitkan oleh perayu-perayu adalah: (i) tiada keterangan, sama ada daripada saksi-saksi pihak responden ataupun keterangan dokumentari bahawa pajakan sementara yang dikeluarkan kepada LTH dan SMSB merupakan tanah hak adat anak-anak negeri seperti yang ditunjukkan di peta bertanda 'M' di dalam penyata tuntutan; (ii) peta bertanda 'M' tidak pernah dikemukakan dalam keterangan walaupun dirujuk di dalam penyata tuntutan; (iii) PW5 tidak memberi keterangan bahawa eks. P7, P8, P10 dan P11 adalah sama seperti peta bertanda 'M' ataupun peta-peta tersebut merangkumi sebahagian besar tanah di dalam pajakan sementara; (iv) saksi-saksi pihak responden tidak memberi keterangan berkenaan peta bertanda 'M'; dan (v) penghakiman Mahkamah Tinggi adalah tidak berdasarkan pliding responden-responden. Oleh itu, tumpuan utama rayuan-rayuan ini adalah berkenaan rujukan yang telah dibuat terhadap peta bertanda 'M' dan kewujudannya memandangkan ianya tidak dijumpai di dalam rekod rayuan.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan perintah Mahkamah Tinggi)
Oleh Abu Samah Nordin HMR (majoriti):

(1) Adalah prinsip undang-undang mantap bahawa di dalam suatu rayuan berkenaan penemuan fakta, mahkamah rayuan tidak sepatutnya campur tangan dengan penemuan tersebut kecuali jika penemuannya itu dengan jelasnya adalah salah. Walau bagaimanapun, adalah adil bagi mahkamah rayuan mencapai kesimpulan berlainan jika penemuan fakta dan deklarasi yang

dibenarkan oleh hakim perbicaraan didapati salah dan tidak disokong oleh keterangan. (*China Airlines Ltd v. Maltran Air Corp*; dirujuk).

(2) Responden-responden perlu membuktikan sebagai perkara fakta bahawa kawasan tanah tersebut yang dituntut adalah tanah yang sama atau sebahagian besar tanah yang sama seperti dinyatakan dalam peta bertanda 'M'. Hujahan undang-undang berkenaan hak adat anak-anak negeri dan tanah hak adat anak-anak negeri hanya menjadi relevan jika responden-responden pertamanya membuktikan bahawa kawasan di tanah tersebut adalah sama dengan tanah atau sebahagian besar tanah seperti dinyatakan dalam peta bertanda 'M'.

(3) Peta bertanda 'M' tidak pernah dikemukakan sebagai keterangan untuk meyokong tuntutan responden-responden, walaupun ianya merupakan kes yang dipohon oleh mereka. Saksi-saksi pihak responden tidak, sama ada melalui keterangan lisan atau dari kenyataan saksi mereka, membuat rujukan kepada peta bertanda 'M'. Sebenarnya, tiada percubaan yang dibuat oleh peguamcara responden-responden untuk membuktikan kewujudan peta bertanda 'M' semasa perbicaraan. Oleh itu, tiada keterangan di hadapan hakim perbicaraan sama ada melalui keterangan dokumentari atau lisan bahawa tanah tersebut di dalam pajakan sementara adalah tanah hak adat anak-anak negeri responden-responden seperti dinyatakan dalam peta bertanda 'M'. Tiada juga keterangan di hadapan hakim perbicaraan bahawa tanah di peta-peta dalam eks. P7, P8, P10 dan P11 adalah sama seperti yang dinyatakan dalam peta bertanda 'M'.

(4) Terdapat keterangan bahawa beberapa bahagian tanah tersebut di dalam pajakan sementara bertindih dengan apa yang dituntut oleh responden-responden berdasarkan peta-peta dalam eks. P7, P8, P10 dan P11. Walau bagaimanapun, tiada keterangan bahawa tindihan tersebut membentuk bahagian tanah di peta bertanda 'M' disebabkan ketiadaan peta tersebut. Oleh itu, adalah jelas bahawa penemuan fakta dan deklarasi yang dibenarkan oleh Mahkamah Tinggi berdasarkan peta bertanda 'M' adalah salah dan tidak disokong oleh keterangan.

(5) Adalah undang-undang nyata bahawa pihak-pihak terikat kepada pliding mereka tersendiri. Jika responden-responden berniat untuk bergantung pada peta-peta di dalam eks. P7, P8,

P10 dan P11 untuk membuktikan kes mereka terhadap pihak perayu, mereka semestinya menyatakan fakta tersebut dalam pliding mereka, jika tidak, mereka tidak layak untuk memberi keterangan berkenaannya semasa perbicaraan. Adalah jelas daripada penghakiman hakim perbicaraan bahawa deklarasi-deklarasi itu dibenarkan berdasarkan keterangan PW5 dan peta-peta dalam eks. P7, P8, P10 dan P11, yang disediakan oleh PW5 tetapi tidak diplid dalam penyata tuntutan. Penghakiman sebegitu adalah bertentangan dengan pliding, tidak boleh dipertahankan dari segi undang-undang dan boleh diketepikan.

(6) Mahkamah ini mempunyai kuasa untuk memerintahkan satu perbicaraan semula di bawah s. 71 dibaca bersama-sama dengan s. 72 Akta Mahkamah Kehakiman 1964, tetapi, syarat-syarat yang dinyatakan di dalamnya tidak hadir dalam rayuan-rayuan di sini. Lagipun, kes ini telah diputuskan berdasarkan merit selepas perbicaraan penuh dan selepas mendengar keterangan saksi-saksi daripada kedua-dua pihak. Oleh itu, tiada dasar wajar untuk perbicaraan semula.

Oleh Hishamudin Mohd Yunus HMR (sebahagiannya bertentangan):

(1) Tiada jawapan yang jelas dan munasabah diterima berkenaan persoalan sama ada peta bertanda 'M' pernah dilampirkan bersama penyata tuntutan. Daripada jawapan yang tidak munasabah dan berbeza, nampaknya keseluruhan prosiding di hadapan Mahkamah Tinggi adalah berkecamuk. Kemungkinan telah berlakunya suatu perbicaraan silap dan ketidakadilan yang telah disumbangkan oleh semua pihak kepada prosiding, termasuk yang arif hakim perbicaraan.

(2) Penghakiman tambahan hakim perbicaraan tidak mengesahkan sama ada peta bertanda 'M' dilampirkan bersama-sama penyata tuntutan ataupun hakim perbicaraan menjelaskan sebab beliau merujuk kepada peta bertanda 'M' dua kali dalam alasan penghakiman terutamanya apabila responden-responden tidak merujuk atau mengemukakan peta tersebut semasa perbicaraan.

(3) Walaupun adanya alasan penghakiman tambahan hakim perbicaraan, persoalan sama ada peta bertanda 'M' pernah dilampirkan dengan penyata tuntutan masih kekal tidak

terjawab. Tanpa keraguan, rayuan-rayuan ini mesti dibenarkan. Walau bagaimanapun, dalam semua kebarangkalian, telah berlaku suatu perbicaraan silap dan tindakan sewajarnya di bawah keadaan sebegini adalah untuk memerintahkan satu perbicaraan semula di hadapan hakim lain tanpa perintah untuk kos.

Case(s) referred to:

Ang Koon Kau & Anor v. Lau Piang Ngong and John G Stein & Co Ltd v. O'Hanlon [1965] AC 890 ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Dowman's case [1586] 9 Rep 96 ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

Kanagasabai Satkuru v. United Malayan Banking Corporation Bhd [1981] 1 LNS 74 FC ***(refd)***

Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC ***(refd)***

North-Western Salt Co Ltd v. Electrolytic Alkali Co Ltd [1913] 3 KB 422 ***(refd)***

Pawding v. London Brick Co [1971] 4 KIR 207 ***(refd)***

State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***

Waghorn v. George Wimprey & Co Ltd [1969] 1 WLR 1764 ***(refd)***

West Rand Co v. Rex [1905] 2 KB 391 ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 71, 72

Rules of the High Court 1980, O. 18 r. 7

Sarawak Land Code (Cap 81), s. 2(a)

(Civil Appeal No: Q-01-104-2010)

For the appellants - Datuk JC Fong SSLC (Dewi Rahmaz Majid SLC with him)

For the respondents - Baru Bian (See Chee How & Desmond Khoo with him); M/s Baru Bian

(Civil Appeal No: Q-02-394-2010)

For the appellants - Sim Hui Chuang (Lim Lip Sze & Fatmawaty Morshidi with him); M/s Hamzah & Ong

For the respondents - Baru Bian (See Chee How & Desmond Khoo with him); M/s Baru Bian

[Appeal from High Court, Kuching; Suit No: 22-93-2011-111-1]

Reported by Kumitha Abd Majid

JUDGMENT

Abu Samah Nordin JCA:

[1] There are two appeals before us, namely Civil Appeal No. Q-01-104-2010 ('the first appeal') and Civil Appeal No. Q-02-394-2010 ('the second appeal'). These appeals are against the decision of the High Court at Kuching, Sarawak in respect of two suits which had been consolidated and heard together by the same judge. We heard both appeals together.

[2] The first and second appellants in the first appeal are the Superintendent of Lands and Surveys Department of Bintulu Division ('SLS') and the State Government of Sarawak ('SGS') respectively. The latter is the employer of the former.

[3] The first, second and third appellants in the second appeal are Ladang Sawit Bintulu Sdn Bhd ('LSB'), Lembaga Tabung Haji ('LTH') and Semai Mekar Sdn Bhd ('SMSB') respectively. The first appellant is a joint venture company set up by the second and third appellants.

[4] The respondents in both appeals are Iban by race and natives of Sarawak. They bring these actions against the appellants on their own behalf as well as on behalf of the residents of the longhouse communities of Selezu, Setulai and Sepandok of Sebauh District, Bintulu, Sarawak.

[5] The subject matter of these appeals concerns a large parcel of land of about 6692 hectares ("the disputed land") described as Lot 2 Block 4 Selezu Land District in the Bintulu Division of Sarawak which was issued to LTH and SMSB by the SLS on 2 December 1996 under a Provisional Lease of State Land pursuant to the Sarawak Land Code (Cap. 81). It is not disputed that LTH and SMSB are the joint registered holders of the disputed land.

[6] For convenience and to avoid any confusion, I refer to the parties in these appeals by their own names.

The Claims

[7] The respondents aver that at all material times they have acquired native customary rights ("NCR") and/or title and/or usufructuary rights over the lands at and/or around the longhouse

communities of Selezu, Setulai and Sepandok of Sebauh District, Bintulu, Sarawak. The boundary or extent of their lands are set out in a map annexed to the statement of claim and marked 'M' and edged in yellow. They claim that the disputed land which was issued by the SLS to LTH and SMSB "cover and include a substantial part of their native customary lands". What this means is that the respondents are not claiming the whole of the disputed land which was issued to LTH and SMSB but only a substantial part of the said land. I mention this at the outset because the issues between the parties at the trial include, among others: (i) the exact location of the native customary lands within the disputed land; (ii) whether the respondents have acquired native customary rights and/or native title and/or usufructuary rights over the land issued to LTH and SMSB; and (iii) whether the issue of the Provisional Lease to LTH and SMSB was bad in law, void and unconstitutional. As between the respondents and LSB, LTH and SMSB, the principal issue is whether LSB, LTH and SMSB or any one of them had trespassed on the respondents' native customary lands as set out in the map marked 'M' and edged in yellow.

[8] The respondents claim that the disputed land issued to LTH and SMSB is their native customary land which had been acquired prior to 1 January 1958 and recognised by the Sarawak Land Code (Cap. 81). The significance of the date ie, 1 January 1958, is because the term, 'Native Customary Land', is defined in s. 2(a) of the Sarawak Land Code (Cap. 81) as, "land in which native customary rights; whether communal or otherwise have lawfully been created prior to 1 January 1958, and still subsists as such". In other words, the Sarawak Land Code recognises such land as native customary land if it can be shown that native customary rights have been lawfully created over the said land prior to 1 January 1958 and continue to subsist as such. It is from the said land that the respondents claim that they derive food, valuable medicine, wildlife and other forest produce for their livehood and sustenance. They had also cultivated padi, fruits trees, rubber, cocoa and other essential trees and crops thereon. They claim that the said land is not just a source of livehood but also constitute life itself as the said land is fundamental to their social, cultural and spiritual survival as the natives of Sarawak.

[9] The common defense of the appellants in these appeals is that the disputed land issued to LTH and SMSB is not part of the respondents' native customary lands. They denied that the respondents have acquired native customary rights over the disputed land.

[10] Now, let us look at the pleadings. The respondents are claiming, *inter alia*, the following reliefs:

(i) A declaration that the respondents have native title and/or native customary rights/or usufructuary rights in the areas in the map marked 'M' and edged in yellow;

(ii) A declaration that the issue of the Provisional Lease of the parcel of land described as Lot 2 Block 4 Selezu Land District and located at Sungai Selejuk, Division of Bintulu, Sarawak in so far as it impairs their native customary rights is bad and/or void;

(iii) A declaration that the issuance of the said lease constitutes a violation of arts. 5, 8 and 13 of the Federal Constitution;

(iv) A declaration that LSB, LTH and SMSB or their servants or agents are trespassing their native customary land and/or otherwise unlawfully interfering with their customary rights in the areas in the map marked 'M'; and

(v) An order for vacant possession of the disputed land.

[11] The lands which the respondents are claiming are identified and described in para. 5(b) of the statement of claim as follows:

> 5(b) The boundary or extent of the said lands are more particular *(sic)* set out in a map annexed hereto and marked 'M' and edged in yellow are the areas within which the plaintiffs claim the said rights and/or title (hereinafter referred to as 'the said native customary land')

[12] By para. 5(c) of their statement of claim, the respondents assert that their native customary rights over the native customary lands are recognised by the Sarawak Land Code (Cap. 81) and/or its predecessors and that the native customary rights were created and/or acquired prior to 1 January 1958 and still subsist as such.

[13] The SLS and SGS joint defence to paras. 5(b) and (c) of the statement of claim is stated in paras. 5.2, 5.3 and 5.5 of their statement of defence:

> 5.2 Further, the 4th and 5th Defendants deny that the area edged in yellow, as set out in the map marked 'M' referred to in paragraph 5(b) of the Statement of Claim and annexed thereto the Statement of claim (hereinafter called "the map marked 'M') are lands over which native customary rights and/or native title and/or usufructuary rights have been acquired and put the Plaintiffs to strict proof thereof.
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> 5.3 Further, the 4th and 5th Defendants say that if the Plaintiffs did occupy the area edged in yellow in the map marked 'M', which is denied, such alleged occupation did not commence prior to 1st January, 1958; and there was no permit issued under section 10 of the Land Code (Cap. 81) of Sarawak to the Plaintiffs for the occupation thereof.
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> 5.5 Additionally, the 4th and 5th Defendants say that the area edged in yellow in the map marked 'M' has not been unequivocally identified and the same is bad for uncertainty".

[14] LSB, LTH and SMSB's joint defence to the respondents' claim over the disputed land include, among others, the following:

(i) LSB deny trespassing on the respondents' native customary lands;

(ii) LTH and SMSB claim that they are the registered holders of the Provisional Lease of State Land and that they have paid valuable consideration in the form of premium to the State Government of Sarawak;

(iii) LTH and SMSB deny that the Provisional Lease was issued in breach of the Sarawak Land Code (Cap. 81); and

(iv) LSB, LTH and SMSB deny entering, clearing, using or occupying the respondents' native customary lands.

[15] After a full trial involving twenty witnesses for the respondents and two witnesses for the appellants, the learned trial judge allowed the respondents' claims for declarations in the following terms:

(i) A declaration that the plaintiffs have native title and/or native customary rights and/or usufructuary rights over lands as delineated in the area marked yellow in the map marked 'M' attached to the statement of claim, and

(ii) A declaration that the two provisional leases issued by the 4th and 5th defendants are subjected to the native title and/or native customary rights and or usufructuary rights of the plaintiffs in or over the native customary lands.

[16] Pursuant to the said declarations the learned trial judge made the following consequential orders:

(i) that the two provisional leases are to be rectified by the 4th defendant to exclude the plaintiff's said native customary lands;

(ii) that the plaintiffs be given forthwith vacant possession of their native customary land;

(iii) that damages be assessed by the Senior Assistant Register; and

(iv) that interest and cost be paid to the plaintiffs.

[17] The learned trial judge's finding that the respondents have native title and/or native customary rights or usufructuary rights within the provisional lease was however not based on map 'M'. It was based entirely and exclusively on four different maps, tendered as exh. P7, P8, P10 and P11 which were prepared by PW5. This is what his lordship in his judgment said:

> In proving the location of the NCR claims, PW5 was called to testify as to how he mapped the NCR area claimed by the plaintiffs. The maps produced by PW5 are exhibits P7, P8, P10 and P11. PW5's qualification is set out in exhibit PW5A – and though not a licensed surveyor, I find him to be a competent witness in view of his experience in the field of mapping. In producing the maps PW5 had relied on the data collected by PW28 and Hydaeki Gani Ak Ujai who were trained by PW5 as to how to collect the relevant data. In collecting the data, they, of course, relied on the boundary as told to them by the various communities of Sg Sepandok, Sg Selezu and Sg Setulai. Since I have found the evidence of the plaintiffs to be credible, I have no reason to doubt the veracity of data collected by PW18 and Hydaeki Gani Ak Ujai. Accordingly, I accept the accuracy of the maps tendered in court delineating the boundary of NCR claims of the communities of Sg Sepandok, Sg Selezu and Sg Setulai.

The Grounds Of Appeal

[18] A common ground of appeal by the appellants in both appeals is that there is no evidence whatsoever, either from the respondents' witnesses or from the documentary evidence that the Provisional Lease issued to LTH and SMSB, was native customary lands as identified in the map marked 'M' in the statement of claim. None of the respondents' witnesses including PW5 made any reference to map 'M'. Map 'M' itself was never tendered in evidence, although referred to in the statement of claim. PW5, who prepared the maps in exh. P7, 8, 10 and 11 did not anywhere in his evidence testify that these maps were similar to map 'M' or that these maps cover or include a substantial part of the land in the Provisional Lease issued to LTH and SMSB. In fact none of the respondents' witnesses gave any evidence on map 'M'.

[19] Another common ground of appeal is that the judgment of the learned trial judge was not based on the respondents' own pleadings.

[20] The main focus in the appeals before us was on map 'M'. There was some confusion as to the existence of map 'M' as we could not find it in the records of appeal. We asked learned counsel for both sides on the existence of map 'M'. Datuk JC Fong who appeared for SLS and SGS and Mr. Sim who appeared for LSB, LTH and SMSB informed us that the statement of claim served on them was without map 'M' although the statement of claim states that map 'M' is annexed to it. Mr. Baru Bian, learned counsel for the respondents insisted that map 'M' was served on the appellants together with the statement of claim. He even told us that he has the map with him. When requested, he could not produce it.

[21] After some hesitation, Mr. Baru Bian, learned counsel for the respondents conceded that map 'M' was not included in the bundle of documents produced at the trial; it was never tendered at the trial and it is not in the appeal records before us. Learned counsel for the respondents then somewhat changed his position and submitted that the respondents relied on the maps in exh. P7, 8, 10 and 11 to prove their case. As I understand it, he is not relying on map 'M' to prove his client's case.

[22] I have read the records of appeal over and over to satisfy myself whether map 'M' was in fact tendered as evidence and whether any of the witnesses from either side, whether through their oral testimony or from the witnesses' statements, have made any reference to map 'M'. I find that map 'M' was never tendered as evidence in support of the respondents' claim, although that was their pleaded case. I also find that none of the respondents' witnesses either by way of oral testimony or from their witnesses' statements made any reference to map 'M'. In fact, there was never any attempt by learned counsel for the respondents to establish the existence of map 'M' from the respondents' witnesses at the trial. PW5, the respondents' principal witness was never examined on map 'M' nor did PW5 testify that any of the maps in exh. P7, 8, 10 and 11 was similar to map 'M'.

[23] Thus, there was no evidence before the trial judge either by documentary evidence or orally that the disputed land in the Provisional Lease was in fact the respondents' native customary land as set out in map 'M'. There was also no evidence before the trial judge that the land in the maps as in exh. P7, 8, 10 and 11 was the same land as set out in map 'M'. In fact it was never put to the respondents' witnesses that maps P7, 8, 10 and 11 were similar to map 'M'. Thus, it is impossible to make a finding of fact that the land in maps P7, 8, 10 and 11 is the same land as in map 'M' as map 'M' was never tendered in evidence. There was never any attempt to amend the statement of claim to substitute map 'M' with maps P7, 8, 10 and 11 so as to suit the respondents' evidence.

[24] There is however evidence in general from the respondents' witnesses relating to native customary rights and native customary lands. But there is no concrete evidence that their native customary lands are within the area in the map marked 'M' and edged in yellow. The absence of such evidence was due to the fact that map 'M' was never tendered at the trial. There is also no evidence that the land within the boundary of map 'M' is the same land or substantially part of the disputed land that had been issued to LTH and SMSB. In fact PW13, PW14, PW15 and PW16 admitted that their customary lands did not encroach on LTH and SMSB's land; a fact which the learned trial judge acknowledged in his grounds of judgment.

[25] There is evidence that certain parts of the disputed land in the Provisional Lease overlap with that claimed by the respondents based on maps P7, 8, 10 or 11. But the problem is this. There is no evidence that the overlapping areas form part of the land in map 'M' due to the absence of the said map. Thus, it is obvious that the findings of facts and the declarations granted by the High Court on the basis of map 'M' were erroneous and unsupported by evidence.

[26] It is a settled principle of law that in an appeal on findings of facts, the appellate court should not interfere with those findings unless it appears that they are clearly wrong: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163. Where, as here, the findings of facts and the declarations granted by the trial judge are found to be erroneous and unsupported by evidence the appellate court is justified in coming to a different conclusion.

[27] At the hearing of the appeals before us, learned counsel for both sides made lengthy submissions on the law pertaining to native customary rights and native customary lands with reference to several local as well as foreign cases.

[28] In my judgment, first and foremost, the respondents have to establish as a matter of fact that the area in the disputed land which they are claiming, is the same land or substantially part of the same land which is set out in map 'M'. The submission on the law with regard to native customary rights and native customary lands would only be relevant if, and only if, the respondents have first established that the area in the disputed land is the same land or substantially part of the same land as set out in map 'M'.

[29] The next common ground of appeal is on the pleading. It is the respondents' pleaded case that the land in the Provisional Lease covers their native customary land or include a substantial part of their native customary lands as in map 'M'. It is trite law that parties are bound by their own pleadings (*Kanagasabai Satkuru v. United Malayan Banking Corporation Bhd* [1981] 1 LNS 74, *State Government of Perak v. Muniandy* [1985] 1 LNS 117). Pleading is not evidence. Order 18 r. 7 of the Rules of the High Court 1980 states that facts, and only facts that must be pleaded but not the evidence by which these facts are to be proved (*Dowman*'s case

[1586] 9 Rep. 96; *North-Western Salt Co. Ltd v. Electrolytic Alkali Co. Ltd* [1913] 3 KB 422). Thus, what is alleged and not admitted needs to be proved.

[30] The importance of pleading cannot be taken lightly. In *Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 the Supreme Court (as it then was), said:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 at page 233:
>
> > Under our adversary system of procedure, for a Judge to disregard the rule by which Counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating what his answer to it is …

[31] In *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 113; [1990] 1 CLJ (Rep) 330 Gunn Chit Tuan SCJ, in delivering the judgment of the then Supreme Court endorsed what Sharma J in *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42 said on the function of pleadings:

> In disposing of a suit or matter involving a disputed question of fact it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[32] So, if the respondents intend to rely on the maps in exh. P7, 8, 10 or 11 to prove their case against the appellants, they must state that facts in their pleading, otherwise they are not entitled to give evidence of them at the trial. (*West Rand Co v. Rex* [1905] 2 KB 391 at 399). Where the respondents' pleaded case is based on map 'M', as in our case, they must give evidence that the land in the provisional lease is their land or substantially part of their land as set out in map 'M' and thereafter prove that the said land in map 'M' is their native customary land, failing which the action is liable to be dismissed.

[33] Thus where for instance, the evidence at the trial established facts different from those pleaded by the plaintiff as constituting negligence, which are not just a variation, modification or development of what has been alleged but which constitute a radical departure from the case as pleaded, the action will be dismissed (*Waghorn v. George Wimprey & Co Ltd* [1969] 1 WLR 1764; *Ang Koon Kau & Anor v Lau Piang Ngong and John G. Stein & Co. Ltd v. O'Hanlon* [1965] AC 890. Where the plaintiff succeeds on findings of fact not pleaded by him, the judgment will not be allowed to stand (*Pawding v. London Brick Co* [1971] 4 KIR 207; *Yew Wan Leong v. Lai Kok Chye, supra.*

[34] In the appeals before us the learned trial judge granted the declarations based on map 'M' which was never tendered as evidence. He even went beyond what was claimed by the respondents. He granted a declaration in respect of two provisional leases and not one provisional lease as specified in the statement of claim.

[35] It is clear from the judgment of the learned trial judge that he granted the said declarations based on the evidence of PW5 and the maps in exh. P7, 8, 10 and 11, which were prepared by PW5 but were never pleaded in the statement of claim. Such judgment is contrary to pleading, untenable in law and liable to be set aside.

[36] There are several other grounds of appeal raised by the appellants but I do not find it necessary to deal with them in view of what I have said above.

Retrial

[37] My view on retrial is this. I do not see any justifiable basis for a retrial. This court has the power to order a retrial under s. 71 read with s. 72 of the Courts of Judicature Act 1964 but the conditions stated therein are not present in the appeals before us.

[38] The position of the respective parties at the hearing of the appeal before us was very clear. Retrial was never in the minds of any party. The appellants' contention was that the order of the High Court was unsupported by evidence. Map 'M', which was the basis of the respondents' pleaded case was not put in

evidence before the learned trial judge. The respondents on the other hand, while conceding that map 'M' was not tendered as evidence, consistently held the view that the maps in exh. P7, 8, 10 and 11 showed that the area in the disputed land cover their native customary lands or include a substantial part of their native customary lands.

[39] At the hearing of these appeals, it has never been suggested at any time that the trial was a nullity; that there was a miscarriage of justice; that there was a breach of the rules of natural justice or that the trial court has no jurisdiction. Both sides were represented by experience and able counsel at the trial. The respondents did not see it fit to amend their pleading to suit the evidence adduced before the court knowing that map 'M' was never tendered as evidence. Map 'M' as pleaded ought to be within their knowledge and possession. In my judgment, this case had been decided on its merits after a full trial and after hearing witnesses from both sides.

[40] The learned trial judge in his brief supplementary ground of judgment which was made pursuant to the consent order of this court, did not see it fit to clarify on the status of map 'M' upon which he relied in granting the declarations.

[41] For the aforesaid reasons, I allow the appeals by the appellants with costs and set aside the order of the High Court dated 21 January 2010.

[42] After conferring with my learned brother, Azhar Ma'ah JCA, we agree that the appellants in each appeal be given costs of RM50,000 here and below. The deposit in C.A No. Q-02-394-2010 shall be refunded to the appellants therein.

Hishamudin Mohd Yunus JCA:

[43] These consolidated appeals are from the decision of the learned judge of the High Court of Kuching given on 21 January 2010. The learned judge had granted, among others, the following reliefs prayed for by the respondents (the plaintiffs before the High Court):

(a) A declaration that the plaintiffs have native title and/or native customary rights and/or usufructuary rights over lands as delineated in the area marked yellow in the map marked 'M' attached to the statement of claim (native customary rights).

(b) A declaration that the two provisional leases issued by the 4th and 5th defendants are subjected to the native title and/or native customary rights and/or usufructuary rights of the plaintiffs in or over the native customary lands.

[44] The other reliefs granted are consequential in nature.

[45] I am allowing these appeals; but with no order as to costs. I am also ordering that this matter be sent back to the High Court of Kuching for a retrial before another judge.

[46] I shall now explain my grounds.

[47] The respondents/plaintiffs are Ibans. They are residents of longhouses in Selezu, Setulai and Sepadok, all in the District of Sebauh, Bintulu Sarawak. They are aggrieved by the fact that the State Government of Sarawak (the second appellant in Civil Appeal No. Q-01-104-2010/5th defendant) had issued (through the Superintendent of Lands and Surveys Department, Bintulu Division, the 1st appellant in Civil Appeal No. Q-01-104-2010/4th defendant) two provisional leases to two companies, namely, the 2nd and 3rd appellants in Civil Appeal No. Q-02-394-2010/2nd and 3rd defendants (the 1st appellant in Civil Appeal No. Q-02-394-2010/1st defendant is a joint venture company of the 2nd and 3rd defendants). The plaintiffs claim that the areas covered by the leases encroach into lands over which they have native customary rights. They commenced this action against the five defendants, seeking certain declarations asserting their legal rights over the lands and other consequential remedies.

[48] In my judgment, in the light of the following factors, namely, the absence of an alleged vital document in the appeal records, namely, a map marked 'M', the opposing and contradictory positions taken by the respective parties on the issue as to whether or not such a map ever existed in the first place, and (with respect) the unclear and non-committal position taken by the learned trial judge in his main grounds of judgment and in his supplementary grounds of judgment pertaining to this alleged map 'M', have cast a cloud over the propriety and legality of the entire proceedings before the High Court. In the course of the hearing of these appeals, I had posed several times to counsel of both sides the question as to whether the map in question was ever attached to the statement of claim, as alleged in the statement of

claim, but I do not seem to get clear and satisfactory answers. From the unsatisfactory and differing answers that I got from counsel, it would appear to me that the entire proceedings before the High Court was a messy affair, if not weird. There could possibly have been a mistrial and a miscarriage of justice contributed by all parties to the proceedings, including, with respect, the learned trial judge.

[49] I shall elaborate on what I meant by my foregoing remarks.

[50] Firstly, if we were to examine the sealed order of the High Court (the subject-matter of the appeals), the first two paragraphs of the order read:

(i) A declaration that the plaintiffs have native title and/or native customary rights and/or usufructuary rights over lands as delineated in the area marked yellow in the map marked 'M' attached to the statement of claim (native customary rights).

(ii) A declaration that the two provisional leases issued by the 4th and 5th defendants are subjected to the native title and/or native customary rights and/or usufructuary rights of the plaintiffs in or over the native customary lands.

[51] It is to be noted that the order makes reference to a particular map that is, a map marked 'M' that is said to be attached to the statement of claim. Legally, this map should be attached to the order as an appendix. This has to be so for the purpose of the execution of the order. Yet if one were to examine the order one would find that this particular map 'M' is not attached to the Order.

[52] All parties, including the learned trial judge (by way of a request for a supplementary grounds of judgment), have been queried as to this absence of this map 'M' from the Order, but, with respect, I do not seem to get clear or satisfactory answers.

[53] Secondly, the statement of claim makes reference to this "map 'M'". Paragraph 5(b) of the statement of claim states:

> (b) The boundary or extend of the said lands are more particularly set out in a map annexed hereto and marked 'M' and edged in yellow are the areas within which the Plaintiffs claim the said rights and/or title (hereinafter referred to as 'the said native customary land').

[54] Yet there is a dispute of fact as to whether this "map 'M'" was ever attached to the statement of claim. Encik Baru Bian, the learned counsel for the plaintiffs/respondents, insists that the said map was appended to the statement of claim. But, the problem is, this "map 'M'" could not be found in the appeal records. It does not appear to be annexed to the statement of claim. And, in the course of the hearing of these appeals, when I requested him to supply this court a copy of "map 'M'", he was not able to do so, giving the lame reason that he had no more copies of "map 'M'" in his possession.

[55] The learned Senior State Legal Counsel, Datuk Fong, for the 4th and 5th defendants, on the other hand, maintains that the "map 'M'" was never attached to the statement of claim. Encik Sim, the learned counsel for the 1st, 2nd and 3rd defendants also takes the same position. However, if this was so, then, when the defendants were served with the writ and statement of claim, it must be obvious to them then that they were served with an incomplete statement of claim, a seriously defective statement of claim; a statement of claim that did not make sense. And so, as a matter of legal courtesy, the defendants' solicitors were duty-bound to bring to the attention of the plaintiffs' solicitors of this absence of "map 'M'" from the statement of claim. After all, no one is perfect and solicitors, at times, do tend to make the silliest of mistakes. But then that is only a matter of legal courtesy. Strictly, as a matter of law, the defendants' solicitors could take the hard line position that it is not the business or duty of the defendants' solicitors to point out to the plaintiffs' solicitors their mistake. They could take the position that the plaintiffs' solicitors had made a serious blunder, and so they (the plaintiffs' solicitors) must be prepared to face the adverse legal consequences. In the present case, the defendants' solicitors took the latter course of action: they did not point out to the plaintiffs' solicitors of the fact that "map 'M'" was not attached to the statement of claim that was served on the defendants. They proceeded to file their respective statement of defence. But the thing that perplexed me is that if the position taken by the defendants' solicitors is that "map 'M'" was never at all attached to the statement of claim that was served on the defendants, why were the defendants' respective statement of defence drafted in a manner as if they were served with "map 'M'" annexed to the statement of claim

and had knowledge what the map contained? For example, paras. 5.5 and 5.6 of the 4th and 5th defendants' statement of defence state:

> 5.5 Additionally, the 4th and 5th Defendants say that the area edged in yellow in the map marked 'M' has not been unequivocally identified and the same is bad for uncertainty.
>
> 5.6 Notwithstanding paragraph 5.5 above, the 4th and 5th Defendants say that the area edged in yellow in the map marked 'M' were and/or are areas covered by Forest Timber Licences No. T/0278 and T/4263 and Licence To Take Forest Produce No. OT/4315. By reason thereof, if, which is not admitted, the Plaintiffs have any native customary rights over the area edged in yellow in the map marked 'M' or any part thereof, such rights have been abandoned, waived or extinguished by reason of the Plaintiffs' acquiescence to logging activities over the same. Such logging activities are still continuing.

[56] Now, if the 4th and 5th defendants are claiming that "map 'M'" was never attached to the statement of claim that was served on them, and assuming that this claim is, indeed, true, then, it must logically follow that they had never seen "map 'M'" at all. But if they had never seen "map 'M'" at all, then how is it possible for the 4th and 5th defendants to make the above averments in their statement of defence? In particular, how could the 4th and 5th defendants possibly aver to the effect:

> … the 4th and 5th Defendants say that the area edged in yellow in the map marked 'M' were and/or are areas covered by Forest Timber Licences No. T/0278 and T/4263 and Licence To Take Forest Produce No. OT/4315.?

[57] How could the 4th and 5th defendants know this as a fact if they had not seen "map 'M'"?

[58] Thirdly, to repeat what has been said earlier, the defendants' counsel take the position that "map 'M'" was never attached to the statement of claim. If this was so, then, why was this non-attachment of the map to the statement of claim not brought to the attention of the learned judge during case management? Or, why wasn't an objection taken by the defendants' counsel during case management? After all, this is a serious omission on the part of the plaintiffs' solicitors. The omission makes the pleadings meaningless. How was the case to proceed to trial if the pleadings are materially incomplete? Now, instead of the defendants' counsel

raising the issue during case management about the absence of "map 'M'" from the statement of claim, on the contrary, we have the strange and unexplained situation, where the parties agreeing to the following issue to be tried:

> 2. Whether the Plaintiffs, at all material times, have acquired native customary rights (NCR) and/or native title and/or usufructuary rights over the lands at and/or around the longhouse communities of Selezu, Setulai and Sepadok of Sebauh District, Bintulu, Sarawak, the boundary or extent whereof is as particularly delineated in yellow in the map annexed to the Statement of Claim marked as "M" (hereinafter referred to as 'the said native customary land).

[59] Just as in the preceding situation that I have pointed out, the defendants appear to be taking contradictory positions.

[60] Further, the learned judge having conduct of the case management, on his own volition, ought to have inquired from the plaintiffs' counsel about "map 'M'" if the map was not annexed to the statement of claim – if, indeed, the defendants' claim, that the map was not annexed to the statement of claim, is true. The learned judge on his own volition ought to have made an order directing the plaintiffs' solicitors to rectify the bundle of pleadings if it was a fact that the map was not annexed to the statement of claim; and ought to have dismissed the plaintiffs' suit should the plaintiffs fail to comply with such an order. With respect, it is wrong for the learned judge having conduct of the case management to have ordered the matter to proceed to trial if it is obvious that the pleading is materially defective. But, then, again, the question is, what was precisely the situation before the learned judge during the case management stage – particularly in the light of the agreed main issue pertaining to "map 'M'"?

[61] Fourthly, if the defendants take the position that "map 'M'" was never attached to the statement of claim, then the order or ruling of the learned judge made at the conclusion of the trial, making reference to "map 'M'", was clearly erroneous. It follows then that the draft order as proposed by the plaintiffs' solicitors to the defendants' solicitors for the latter's approval must also be erroneous as well as the proposed draft Order contains a reference to "map 'M'". Yet, despite taking the position that "map 'M'" was never at all attached to the statement of claim, the defendants' solicitors never questioned the correctness of either the ruling/order of the learned judge (at the conclusion of

the trial) or the plaintiffs' solicitors' proposed draft. Nor did they ever request to the High Court for an appointment with the learned trial judge for a review of the learned judge's ruling or order before the draft order was perfected. Instead, the defendants' solicitors, without any question or reservation whatsoever, proceeded to approve the proposed draft order and allowed it to be perfected.

[62] Fifthly, Encik Baru Bian, in the course of his submission before this court, when questioned by me about "map 'M'", insisted that this alleged map was attached to the statement of claim. If this is true, then, how is it that the appeal records do not contain "map 'M'"? It is true that the appeal records are prepared by the appellants' solicitors and not by the respondents' solicitors. But where such an omission is obvious and clearly prejudicial to the plaintiffs/respondents, the plaintiffs' solicitors owe a duty to their clients to bring to the attention of the appellants' solicitors of such an omission; and, subsequently, to bring to the attention of this court if, after having been so notified, such an omission is still not rectified by the appellants' solicitors.

[63] But be that as it may, Encik Baru Bian informed this court that in the course of the trial the plaintiffs had decided not to rely on "map 'M'" instead, the plaintiffs relied on another map. If this was so, then, how does one explain the fact that the learned trial judge, in his main grounds of judgment, began by saying:

> **Proceedings**
>
> The plaintiffs, Iban by race, claim for native customary rights on lands as residents of the longhouse communities of Selezu, Setulai and Sepadok of Sebauh District, Bintulu, Sarawak. The exact location of their claim is as set out in the map annexed to the statement of claim marked "M" and edged yellow. The defendants deny the existence of such claims and in substance puts the plaintiffs to strict proof.

[64] Again, if indeed, the plaintiffs had abandoned "map 'M'" in the course of the trial, then, how is it that the learned judge, at the conclusion of the trial, still made an order referring to "map 'M'", as I have pointed out at the beginning of this judgment? And, how is it that, when the learned trial judge made such a reference (to "map 'M'") at the end of the trial, Encik Baru Bian did not request an appointment with the learned judge to correct the 'error', but instead proceeded to prepare a draft order that makes a reference to "map 'M'"?

[65] Sixthly, the learned trial judge referred to "map 'M'" twice in his main grounds of judgment, that is, as I have pointed out, the first time at the first paragraph of his grounds of judgment and the second time at the concluding part of the same. As this "map 'M'" is not found in the appeal records (and nor could we obtain a copy of this alleged map either from the parties or from the High Court file) and since there is a dispute between the appellants and the respondents as to whether or not this particular map was appended to the statement of claim as alleged in para. 5(b) of the statement of claim, we proposed to all counsel before us that the learned trial judge ought to be given an opportunity to clarify as to whether "map 'M'" was in fact appended to the statement of claim. All counsel before us agreed to the proposal and hence the Court's Registrar was directed to write to the Secretary of the learned trial judge to request a supplementary grounds of judgment from the learned judge that would shed more light on "map 'M'", particularly, on the question as to whether the said "map 'M'" was ever annexed to the statement of claim, since there is a dispute between the parties as to whether the said map was annexed to the statement of claim. The registrar's letter brought to the learned trial judge's attention that the said "map 'M'" could not be found in the appeal records. The registrar's letter also brought to the attention of the learned trial judge of the fact that although Encik Baru Bian had informed the Appeal Court that "map 'M'" was never tendered as an exhibit to the High Court during the trial, yet there is still this reference to this "map 'M'" in the learned trial judge's grounds of judgment and in the sealed order of the court. The learned judge furnished his supplementary grounds of judgment as requested by us. However, with respect, in his supplementary grounds of judgment, the learned judge, unfortunately, does not appear to me to have provided clear answers to the matters sought by the registrar's letter. The supplementary grounds of judgment merely say:

> Pursuant to the direction of the Court of Appeal through a letter ref. () dalam MRRS No. Q-02-289-03 dated 27.7.2010, I now give my "Alasan Penghakiman lanjutan" as follows:
>
> In respect of the plan marked "M", it is the plan attached to the Statement of Claim as set out in paragraph 5(b) of the Statement of Claim wherein it states that plan marked 'M' is attached.
>
> For ease of reference, the relevant paragraph of the Statement of Claim is reproduced as per Appendix A.

> The defendants also made reference to this map. A copy of the Defence of the 1st, 2nd and 3rd Defendants dated 26.9.2001 filed by their advocates is also attached as per Appendix B. A copy of the Defence of the 4th & 5th Defendants dated 14.9.2001 filed by the Legal Officer of the State Attorney General Chambers is hereby attached as Appendix C.

[66] It is to be noted that the above supplementary grounds of judgment does not confirm whether or not "map 'M'" was attached to the statement of claim; nor does the learned trial judge explain as to why he made reference to "map 'M'" twice in his main grounds of judgment when the plaintiffs did not refer nor tender the said "map 'M'" during the trial. Although the learned trial judge was informed by the registrar's letter that "map 'M'" could not be found in the appeal records, yet the learned judge in his supplementary grounds of judgment did not think it fit to assist the Court of Appeal by appending a copy of the said controversial map. Instead, the learned judge only referred to the statement of claim and to the statement of defence of the respective defendants and appended these documents to his supplementary grounds of judgment; but, with respect, this is of no assistance to us as these are documents that we are familiar with and which could be found in the appeal records anyway.

[67] In conclusion, I hold that in spite of the supplementary grounds of judgment of the learned trial judge, the question as to whether or not "map 'M'" was ever appended to the statement of claim, remains unanswered. In my judgment, considering the whole scenario in its totality, this is a highly unsatisfactory state of affairs. This issue about the existence of "map 'M'" should not be allowed to linger. On my part, it is still lingering in my mind. Undoubtedly, these appeals must be allowed. But the difficult question is: should there be a retrial? Having given a serious thought on this issue, I am taking the position that in all probability there had been a mistrial and the appropriate course of action under the circumstances would be to order a retrial before another judge; and that there should be no order as to costs.

[Appeals allowed with no order as to costs; order of the High Court set side and a retrial ordered to be held before another Judge.]